INDEX

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Question presented	2
Interest of the United States	2
Statement	5
Argument	7
The Pennsylvania statute does not violate the Establishment Clause because its purpose and effect are to improve secular education and it does not support or advance religion	7
Introduction and Summary	7
A. Textbooks and instructional materials	10
B. Teachers' salaries	15
1. *The salary reimbursement provisions serve a secular purpose*	17
2. *The primary effect of the salary reimbursement provisions is not to aid religion or improperly to entangle the state in its propagation*	20
Conclusion	24

CITATIONS

Cases:

Abington School Dist. v. *Schempp*, 374 U.S. 203 7

Barenblatt v. *United States*, 360 U.S. 109 19

Board of Education v. *Allen*, 392 U.S. 236 ..... 7, 8, 10, 11, 12, 13, 14, 15, 17, 21, 22

408-154—70——1

Cases—Continued

	Page
Everson v. *Board of Education*, 330 U.S. 1	10
McCray v. *United States*, 195 U.S. 27	20
McGowan v. *Maryland*, 366 U.S. 420	19
Pierce v. *Society of Sisters*, 268 U.S. 510	2, 17, 19
Protestants and Other Americans United for the Separation of Church and State v. *United States*, C.A. 6, No. 20,270	4
Sweezy v. *New Hampshire*, 354 U.S. 234	16
Tilton v. *Richardson*, No. 153, this Term	4, 19
United States v. *O'Brien*, 391 U.S. 367	19
Walz v. *Tax Commission*, 397 U.S. 664	9, 14, 16, 19
Zorach v. *Clauson*, 343 U.S. 306	15

Statutes:

Constitution of the United States:	
First Amendment	5, 6, 19
Fourteenth Amendment	5
Elementary and Secondary Education Act of 1965, Title II, 20 U.S.C. §§ 821, *et seq.*:	
20 U.S.C. § 825(a)	4
Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 Pa. Stat. Ann. §§ 5601, *et seq.*:	
Section 5602	5
Section 5602[1]	21
Section 5603	6, 10
Section 5603(3)	12, 20
Section 5604	5, 6, 12, 13, 20
Section 5607(a)	13

Miscellaneous:

Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680	22
Moynihan and Glazer, *Beyond the Melting Pot* (1963)	24
H. Doc. No. 91–267, 91st Cong., 2d Sess.	4

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., APPELLANTS

v.

DAVID H. KURTZMAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the district court (App. 78–112) are reported at 310 F. Supp. 35.

JURISDICTION

The order of the district court was entered on November 28, 1969 (App. 100). The notice of appeal was filed on December 17, 1969. Probable jurisdiction was noted on April 20, 1970. 397 U.S. 1034. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 Pa. Stat. Ann (1970 Cum. Pocket Part) §§ 5601, *et seq.*, is reproduced in full at App. 18–25.

QUESTION PRESENTED

The United States will discuss the following question:

Whether the Pennsylvania Nonpublic Elementary and Secondary Education Act, under which the State reimburses religiously-affiliated private schools for teachers' salaries incurred and textbooks and instructional materials used in teaching secular subjects, violates the Establishment Clause of the First Amendment, which applies to the States under the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

It is the policy of the United States to improve the quality of education and to promote the maximum availability and utilization of educational resources. Consonant with this Court's decision in *Pierce* v. *Society of Sisters,* 268 U.S. 510, it is also its policy to respect the rights of parents to send their children to a religiously-affiliated school that they believe best meets their children's needs.

In his message on Educational Reform on March 3, 1970, the President stated:

The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The non-public schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand non-public elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion

per year in operations, with an estimated $5 billion more needed for facilities. [H. Doc. No. 91–267, 91st Cong., 2d Sess., p. 9.]

Congress previously had taken steps in furtherance of this policy. Title II of the Elementary and Secondary Education Act, 20 U.S.C. 821, *et seq.* (enacted in 1965), provides for grants to states for the acquisition of books and instructional materials for the use of children and teachers in public and private (including religiously-affiliated) elementary and secondary schools. Although there are distinctions between the type of government aid under the latter statute and that under the Pennsylvania program,[1] the same constitutional principles govern the validity of both programs. For this reason, and also because the Pennsylvania program furthers the federal policy of improving the quality of private as well as public education, the United States is filing this brief *amicus curiae* in support of the constitutionality of the Pennsylvania Nonpublic Elementary and Secondary Education Act.[2]

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[1] The constitutionality of Title II of the federal Act is presently pending before the United States Court of Appeals for the Sixth Circuit in *Protestants and Other Americans United for the Separation of Church and State* v. *United States* (No. 20, 270).

[2] Title I of the Higher Education Facilities Act of 1963, 20 U.S.C. 701–758, provides for federal grants to assist colleges and universities in constructing certain types of academic facilities. The question whether the Act authorizes such grants to church-related institutions and, if it does, whether it is constitutional, is before the Court in *Tilton* v. *Richardson*, No. 153, this Term.

STATEMENT

This is a suit to enjoin enforcement of the Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 Pa. Stat. Ann. §§ 5601, *et seq.*, on the ground that the Act violates the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (App. 15). The plaintiffs are individual citizens and taxpayers of Pennsylvania (one of whom, appellant Lemon, also is the parent of a Negro child attending a Pennsylvania public school), various religious and educational organizations, and a Pennsylvania affiliate of the National Association for the Advancement of Colored People (App. 9–10). The defendants are the Superintendent of Public Instruction and the Treasurer of Pennsylvania, and various Pennsylvania religiously-affiliated schools.

The statute rests on legislative findings that an educational "crisis" exists in both the state and the nation, due to rapidly increasing school costs; and that nonprofit schools further the public interest in educating the young, relieve the state of the financial burden of educating more than 20 percent of all pupils in Pennsylvania, and enhance the liberty of parents to choose the type of school they wish their children to attend. 24 Pa. Stat. Ann. § 5602. In order to assist in meeting increasing educational costs, the state educational authorities are empowered to contract with private schools to purchase "secular educational services," including teachers' salaries, textbooks and educational materials (§ 5604). Reimbursement for these services may be made only for courses in mathematics,

modern foreign languages, physical science, and physical education (*ibid.*); reimbursement is prohibited for any course containing "any subject-matter expressing religious teaching, or the morals or forms of worship of any sect" (§ 5603). Textbooks and instructional materials provided under this program must be approved by the state Superintendent of Public Instruction (§ 5604). In order to qualify for reimbursement, a school must demonstrate that "a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction" has been obtained.[3] *Id.*

The defendants moved to dismiss on the ground, *inter alia*, of failure to state a claim (App. 35–38, 55–56).[4] A three-judge district court (Circuit Judge Hastie dissenting) held that the statute does not violate the Establishment Clause (App. 78–112). The court ruled that the statute has the secular purpose of advancing the education of the state's children in secular subjects and that the statutory safeguards are sufficient to assure that it does not have the effect of furthering religion (App. 88–98).[5]

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[3] Five years after the effective date of the Act, teachers not in service on its effective date must have a certification equivalent to that of teachers in public schools (§ 5604).

[4] The schools also sought dismissal on the ground of lack of standing (App. 27–34). The court unanimously held that the individual plaintiffs had standing to raise the First Amendment challenges to the Act but not the Fourteenth Amendment issue, and that the organization plaintiffs had no standing to challenge the Act (App. 84–88).

[5] The court also held that since there was no allegation of any coercive effect of the Act on the practice of the plaintiffs' religion, it did not offend the Free Exercise Clause (App. 99).

ARGUMENT

THE PENNSYLVANIA STATUTE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE ITS PURPOSE AND EFFECT ARE TO IMPROVE SECULAR EDUCATION AND IT DOES NOT SUPPORT OR ADVANCE RELIGION.[6]

INTRODUCTION AND SUMMARY

In its most recent decision dealing with state aid to religiously affiliated private schools, *Board of Education* v. *Allen*, 392 U.S. 236, 243, this Court reaffirmed the test, originally announced in *Abington School District* v. *Schempp*, 374 U.S. 203, "for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits":

> what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson* v. *Board of Education* * * *.

In *Allen*, the Court held that under this test a New York statute providing for the free lending by local school authorities of text books to all students in cer-

[6] To the extent that appellants still press their free exercise claims in this Court, they are insubstantial, for there is no suggestion that the Pennsylvania Act involves any coercion in the practice or exercise of religion. See *Board of Education* v. *Allen*, 392 U.S. 236, 248–249; *Abington School District* v. *Schempp*, 374 U.S. 203, 222–223.

tain grades, including those attending parochial schools, did not violate the Establishment Clause. Pointing out that there was no showing that "the necessary effects of the statute" are "contrary to its stated [legislative] purpose" of "furtherance of the educational opportunities available to the young" (392 U.S. at 243), the Court held that although free books may "make it more likely that some children choose to attend a sectarian school * * * [that] does not alone demonstrate an unconstitutional degree of support for a religious institution" (p. 244). The Court stated (pp. 247–248, fn. omitted) that this country's

> continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

On the record before it in the *Allen* case, the Court rejected the contentions that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. * * * Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion" (p. 248).

Last Term in *Walz* v. *Tax Commission*, 397 U.S. 664, the Court, in holding that tax exemptions granted by a state to churches do not violate the Establishment Clause, cautioned against "rigidity" in applying the concept of "constitutional neutrality" in the government's relationship with religion (p. 669). Such rigidity, the Court warned, "could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited" (*ibid.*). The applicable "general principle," the Court stated (*ibid.*), is that

> we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. * * *

The aid that Pennsylvania provides to religious schools under this statute consists of reimbursement payments for (a) textbooks and instructional materials and (b) teachers' salaries. For both categories, the statute provides careful safeguards to insure that the financial aid is given only for the teaching of secular subjects, and to prevent its being used for any course containing "any subject matter expressing re-

ligious teaching, or the morals of forms of worship of any sect" (§ 5603).

The validity of the state's reimbursing religiously-affiliated schools for the cost of secular books and teaching materials is, we submit, directly sustained by *Allen*. Although there are distinctions between the form of aid involved in *Allen* and that under the Pennsylvania statute, they are not significant because both statutes have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion" (*Allen, supra*).

Just as the textbooks involved in *Allen* were "different from [the] buses" involved in *Everson* v. *Board of Education*, 330 U.S. 1, upon which the Court relied in *Allen*, so teachers' salaries "are different from [books]" (*Allen*, 392 U.S. at 244). What *Allen* makes clear, however, is that the critical inquiry is not the particular form that the state aid to religiously-affiliated schools takes, but its "purpose and * * * primary effect." The purpose and primary effect of Pennsylvania's reimbursement for teachers' salaries, like those of its reimbursement for textbooks and teaching materials, is secular, and the statute neither "advances nor inhibits religion." 392 U.S. at 243.

A. TEXTBOOKS AND INSTRUCTIONAL MATERIALS

The New York statute involved in *Allen* required local school boards to purchase textbooks and lend them without charge to children attending public or private schools, including church-related schools, that complied with the State's compulsory education law.

Such aid was restricted to books "designated for use in any public, elementary or secondary schools of the state or * * * approved by any boards of education" or other school authorities. 392 U.S. at 239. As previously noted this Court, in upholding the statute, emphasized that, in addition to their sectarian functions, church-related schools play an important role in the national system of secular education. 392 U.S. at 247–248. It pointed out that furthering "the educational opportunities available to the young" by providing them with textbooks was a valid, secular legislative purpose, even when such opportunities are extended to pupils in church-related schools. 392 U.S. at 243. "Perhaps," said the Court, "free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." 392 U.S. at 244.

The Court in *Allen* also ruled that the New York statute properly implemented this secular purpose. It pointed out that the statute gave the State full authority to insure that only secular books would be supplied; the furnishing of religious books was prohibited. "Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval." *Id.* at 244–245. It thus appeared that "books loaned to students are books that are not unsuitable for use in the public schools because of religious content." *Id.* at 245.

The Pennsylvania statute here involved similarly contains adequate provisions designed to assure that the materials for which the Commonwealth pays are used only for secular purposes. As in *Allen,* there is a flat prohibition on reimbursement for materials relating to "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." § 5603(3). Moreover, before making payment the public school authorities

> shall establish that (i) solely textbooks and other instructional materials approved by the Superintendent of Public Instruction shall have been employed in the instruction rendered; (ii) a satisfactory level of pupil performance in standardized tests approved by the Superintendent of Public Instruction, shall have been attained; (iii) after five years following the effective date of this act, the secular educational service for which reimbursement is sought was rendered by teachers holding certification approved by the Department of Public Instruction as equal to the standards of this Commonwealth for teachers in the public schools: Provided, however, That any such service rendered by a teacher who, at the effective date of this act, was a full time teacher in a nonpublic school, shall be deemed to meet this condition. [§ 5604.]

The materials and the teachers who use them must thus meet the State's qualifications for public schools, and the pupils must demonstrate by test scores that the materials are being used to achieve the proper educational level.

Indeed, in two significant respects the guarantee of secular use of the materials is even stronger in the Pennsylvania statute than it was in New York.

First, New York permitted the loan of all "textbooks which are designated for use in any public, elementary or secondary schools of the state or are approved by any board of education" without restriction to subject matter (*Allen,* 392 U.S. at 239). Pennsylvania, however, limits the areas for which reimbursement may be made to four subjects least amenable to the possible infusion of a sectarian viewpoint: mathematics, modern foreign languages, physical science, and physical education. § 5604.

Second, New York purchased the books and made them available to the religious schools, and relied on the assumption that the latter would fully observe the statutory restrictions upon their use. Pennsylvania, however, reimburses the schools for their costs of obtaining the materials, and to obtain reimbursement the schools must satisfy the State authorities that the materials were appropriate and were properly used:

> Any nonpublic school seeking such reimbursement shall maintain such accounting procedures, including maintenance of separate funds and accounts pertaining to the cost of secular educational service, as to establish that it actually expended in support of such service an amount of money equal to the amount of money sought in reimbursemnt. [§ 5607(a).]

Thus, under the Pennsylvania statute the schools have the burden of showing that the materials were used for a secular purpose, and no funds may be dis-

bursed until they do so. If any of the materials were used for a religious purpose, the State would not pay for them.

The fact that under the *Allen* statute the State only loaned the books to the children whereas here the schools themselves purchase the books and then obtain reimbursement from the State, does not alter the basically secular character of the Pennsylvania program. The critical consideration is the same in both cases: the State has provided adequate guarantees that the materials will be used solely for secular purposes.

It is also immaterial, we believe, that the Pennsylvania statute provides a direct financial benefit to church-related schools whereas in *Allen* the benefit was provided indirectly, by supplying the books to the children who attend the schools. Although in *Allen* the Court stated that the benefit was "to parents and children, not to schools," 392 U.S. at 243–244, it subsequently pointed out that in *Allen*

> making textbooks available to pupils in parochial schools in common with public schools was surely an "aid" to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books. Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of aid contravening the First Amendment. [*Walz* v. *Tax Commission*, 397 U.S. 664, 671–672.]

Here, too, the fact that the State's payment for these materials may alleviate the financial burdens of religiously-affiliated schools does not render the Penn-

sylvania Act unconstitutional. Once again, the important fact is that the Act contains adequate provisions designed to limit the aid to the purely secular instruction in which the state has a strong interest. As we view the Pennsylvania statute—with its prohibition on any assistance for religious purposes; its scrutiny of the materials furnished, the qualifications of the teachers using them, and the results they achieve; its restriction of aid to four wholly secular subjects; and its procedures for auditing and payment only after the materials have been used for secular purposes—it contains assurances fully comparable to those in the New York statute that the materials given for secular purposes will not be diverted to unconstitutional uses.

B. TEACHERS' SALARIES

The validity of the State's reimbursement of salaries (or portions thereof) paid teachers for giving instruction in the four secular subjects for which reimbursement is permitted, presents a more difficult question. The problem of drawing the line between permissible and impermissible State aid to religious institutions "is one of degree" (*Zorach* v. *Clauson*, 343 U.S. 306, 314). Payment of salaries of teachers in religiously-affiliated schools may bring the State closer to "the line between state neutrality to religion and state support of religion" (*Allen*, 392 at 242) than providing buses and hot lunches and supplying secular books and educational materials. The Pennsylvania statute, however—with its carefully drawn limitations and protections designed to insure that State aid covers only se-

cular teaching in religiously-affiliated schools—does not cross the line into the constitutionally-forbidden area.

The problem is not that the easing of the financial problems of religiously-affiliated schools through government payment of teachers' salaries constitutes impermissible government aid to religion. As we have shown in the case of textbooks and instructional materials (*supra*, pp. 10–15), the provision of such a benefit does not automatically condemn the government's assistance. Rather, the problem stems from the danger that part or all of the government funds granted for teachers' salaries might in practice be used for teaching religion or religiously-oriented subjects. Unlike the case of books and instructional materials, however, where the State can examine the materials to insure that they are wholly secular, there is no comparable method by which the State can control the character of the teaching in the schools—unless the government undertook to monitor classroom instruction, an intrusion into the academic process that would itself pose serious constitutional problems. Cf. *Sweezy* v. *New Hampshire*, 354 U.S. 234.

Once again, the "test is inescapably one of degree" (*Walz*, 397 U.S. at 674); is the particular form of State aid to religiously-affiliated schools either "aimed at establishing, sponsoring, or supporting religion" or does it result in "an excessive government entanglement with religion" (*ibid.*)? As long as the particular State program reflects "a benevolent neutrality which would permit religious exercise to exist without sponsorship and without interfer-

ence" (*id.* p. 669), the constitutional requirement is satisfied.

There are no absolutes in this delicate area and the validity of government aid to religiously affiliated schools through payment of teachers' salaries must depend upon whether the particular program (1) has a religious rather than a secular purpose and (2) aids religion or improperly entangles the State in its propagation. As we now show, the Pennsylvania provisions for State reimbursement of teachers' salaries incurred in providing instruction in secular subjects violates neither of these standards and therefore does not contravene the Establishment Clause.

1. *The salary reimbursement provisions serve a secular purpose.* The purpose of the salary reimbursement provisions is as secular as that of the textbook and instructional materials provisions. In each instance, the legislature was seeking to improve the quality of secular education available to pupils in nonpublic schools. It found that rising costs and increasing demand for schooling constituted a threat to the quality of the education being offered to pupils who attend private schools. This Court recognized in *Allen* the validity of this concern: "if the State must satisfy its interest in secular education through the instrument of private schools [*Pierce* v. *Society of Sisters*, 268 U.S. 510], it has a proper interest in the manner in which those schools perform their secular educational function." 392 U.S. at 247.

The necessary implication of this conclusion, we believe, is that the State may pay for salaries neces-

sary to enable the schools to perform that function by instructing in secular subjects—provided this can be accomplished without undue involvement in the affairs of religiously-affiliated schools or sponsorship or endorsement of their religious principles. Pennsylvania's concern with maintaining and raising the standards of instruction in ~~church-related~~ religiously-affiliated schools is constitutionally permissible, and the means it has chosen to satisfy this concern—reimbursing the schools for teachers' salaries and conditioning that reimbursement on state-approved teacher certification—are not constitutionally forbidden.

The financial problems facing the religiously-affiliated schools in Pennsylvania, which the legislature found educate approximately 20 percent of all children in the State (App. 19; brief for appellee schools, p. 10), are serious. The legislature further found that "freedom to choose nonpublic education, meeting reasonable State standards, for a child is a fundamental parental liberty and a basic right," and that if a majority of the children now attending non-public schools in Pennsylvania were to shift to the public schools, "an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania" (App. 20). Pennsylvania religiously-affiliated schools thus are performing a vital role in providing secular education for a large portion of the children there, and insuring the high quality of that education is a valid State concern.

Certainly the state is not required to permit the quality of education in those schools to deteriorate to

the point where parents of children attending them must choose between abandoning the right to send children to schools of their own religious persuasion or the opportunity to obtain a quality education. Although government may not be required to include religiously-affiliated educational institutions in programs of financial assistance (see our brief in *Tilton* v. *Richardson,* No. 153, this Term), it is not barred from providing assistance to the secular functions of such institutions, where to do so furthers the religious freedom of those who choose to attend them. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Commission,* 397 U.S. 664, 673.

The Pennsylvania Act therefore rests on two related secular bases. First, since the state cannot compel attendance at public schools, *Pierce* v. *Society of Sisters, supra,* it may take appropriate steps to assure high standards in private schools, including the provision of financial aid. Second, it may do so where its action obviates the need for parents who wish a religious education for their children to sacrifice the quality of the secular instruction they receive in those schools.

Appellants, however, ask this Court to go behind the legislative statement of purpose to determine the "real" intent of the legislation. This Court wisely has consistently declined to examine into the motives of legislators. *United States* v. *O'Brien,* 391 U.S. 367, 383; *McGowan* v. *Maryland,* 366 U.S. 420, 496 (opinion of Mr. Justice Frankfurter); *Barenblatt* v. *United*

States, 360 U.S. 109, 132–133; *McCray* v. *United States,* 195 U.S. 27, 56. Motives are frequently mixed and the legislative process necessarily functions by compromises and accommodations that make the legislators' motives almost impossible to ascertain.

2. *The primary effect of the salary reimbursement provisions is not to aid religion or improperly to entangle the state in its propagation.* The Pennsylvania Act is narrowly drawn. It permits reimbursement for instruction only in four specified "secular" subjects, and secular is defined as "any course which is presented in the curriculum of the public schools of the Commonwealth and shall not include any subject matter expressing religious teaching, or the morals or forms of worship of any sect." § 5603(3). Thus, the courses for which reimbursement is permitted parallel those in the public schools, and reimbursement is precluded for any religious instruction.

Moreover, reimbursement is limited to four subjects which do not lend themselves to religious coloration: mathematics, modern foreign languages, physical science, and physical education. § 5604. The regulations under the Act further limit these subjects to avoid possible religious overtones. (See App. 94–95, nn. 16–19.) Physical science, for example, excludes biology (App. 94, n. 17); physical education excludes health instruction and sex education (App. 95, n. 19); and modern foreign languages exclude Latin and classical Hebrew and Greek (App. 94–95, n. 18). Pennsylvania has thus painstakingly sought to minimize any possible religious aspect to the teaching of these secular subjects.

The teacher certification and pupil testing requirements of the Act accomplish the same objective. Public certification indicates that a teacher in a religiously-affiliated school will have no lower professional qualifications than his colleagues in the public schools. Standardized testing provides a strong inducement for a religiously-affiliated school to maintain a high level of instruction in its secular courses—perhaps even conforming to the curriculum in the public schools—so as not to jeopardize its reimbursement by poor student performance on the examinations. The increasing demand for quality education, which the legislation reflects (§ 5602(1)), the narrow range of subjects for which reimbursement is allowed, and the certification and examination requirements of the Act combine to provide substantial assurance that the secular purposes of the Act will be observed. There is no more reason for assuming here than there was in *Allen* that "all teaching in a sectarian school is religious" or that "the processes of secular and religious training are so intertwined" that, in terms of the issue in this case, teaching of secular subjects is part of "the teaching of religion" (392 U.S. at 248).

Nor is the state impermissibly employing religious means to achieve non-religious ends. The thrust of the *Allen* decision was that substantial weight should be given to the consistent pattern of legislative judgments that the multiple functions performed by religiously-affiliated schools are generally severable. *Allen* thus recognized that the means of state aid—secular instruction in religiously-affiliated schools—is as secular as the ends, where the separation of sacred and secu-

lar will be maintained. The Pennsylvania Act maintains such separation.[7]

* * * * * * *

There remains for discussion the claim, common to the payments both for textbooks and materials and for teachers' salaries, that their effect is to foster religious divisiveness and to make religion a subject of political controversy, contrary to the spirit of the Establishment and Free Exercise Clauses. Members of this Court (*e.g.*, Mr. Justice Harlan, concurring, and Mr. Justice Douglas, dissenting, in *Board of Education* v. *Allen,* 392 U.S. 236, 249, 254), Judge Hastie, dissenting below (App. 104–105), and Professor Freund (*Public Aid to Parochial Schools,* 82 Harv. L. Rev. 1680) have expressed similar concern.

This claim, of course, is necessarily conjectural and is not subject to empiric demonstration. It poses difficult political problems that are more appropriate for legislative than for judicial resolution. Cogent arguments can be made on both sides of the question, and the effect upon the body politic of government programs to aid the secular activities of religiously-affiliated schools ultimately depends upon the reaction of the nation's citizenry.

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[7] Appellants contend that the necessary effect of the Act is to prefer one religion—Roman Catholicism—over others. The Act, however, is drawn with complete inclusiveness and neutrality, manifesting concern with the education of pupils in all nonpublic schools. It merely takes the schools and their enrollments as they are. Furthermore, appellants' argument that the Act prefers Catholicism is contradicted by their assertion that wealthy "private academies" not affiliated with the Catholic Church are receiving more than their fair share of reimbursement under the Act (Br., pp. 33–34).

The subject is one upon which the courts properly should give great weight to the legislative judgment. Pennsylvania has made the judgement, reflected in its Non-public Elementary and Secondary Education Act, that any divisive effect the program might have is outweighed by the benefits to the State's school population of assuring the high quality of secular education in private schools. Reasonable men could well reach different conclusions on that issue. As against the view that such government aid creates dissension, others might argue, with equal sincerity and force, that a greater divisive factor would be introduced into our society if religiously-affiliated schools were excluded from general programs of educational aid and were thus rendered unable to provide adequate secular education for millions of the country's children whose parents wish them to attend such schools. As the President stated this year in his message on Educational Reform, quoted earlier in this brief (*supra*, p. 3):

> The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools through which educational innovations come, both systems benefit, and progress results.

One of the great strengths of the American political system has been its ability to provide reasonable

accommodations of competing viewpoints and pressures, religious as well as political. See, *e.g.*, Moynihan and Glazer, *Beyond the Melting Pot* (1963). As long as State aid to religiously-affiliated schools is primarily secular in purpose and effect—as we believe is true of the Pennsylvania Act—this Court should not condemn it under the Establishment Clause because of uncertainly over how the majority of the people will react to it.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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*In lieu of the Solicitor General, who is disqualified for personal reasons.

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